(4)

No. 07-654

Supreme Court, U.S.
FILED
DEC 19 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

KENNETH JONES,

Petitioner,

v.

ADAM JENNINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment is violated when a police officer, who along with other officers has gained control over an arrestee, increases the force he is applying to the arrestee's ankle to the point of breaking it, well after the arrestee was under control.

2. Whether the First Circuit applied the correct analysis in reversing the trial court's post trial granting of qualified immunity, by resolving all factual disputes pertaining to the issue of qualified immunity in favor of the prevailing party.

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

One need only read the majority opinion from the First Circuit in this matter once to perceive that the petitioner's statement of his case is based upon misstatements of the holding of the First Circuit in this case and misstatements of what is contained in the record in this matter.

The petitioner claims that the First Circuit held that the petitioner was responsible for a constitutional violation merely for using a "pain compliance technique" and not crediting a suspect's claim of pain. As the First Circuit opinion clearly points out, the case was not tried on that theory, the jury was not asked to find liability on that theory, and the First Circuit was not reversing the trial judge's granting of judgment as a matter of law based upon that theory.

The First Circuit rested its decision on the proven facts, including a review of a video tape of the incident involved here, that "Jones increased the force he used to restrain Jennings after Jennings had ceased to resist and after Jennings had announced his prior ankle injury. That increased use of force broke Jennings' ankle". (Pet. App. 17).[1]

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[1] References to the Record Appendix filed with the First Circuit are designated "R" in this brief. References to the petitioner's Appendix filed in this appeal are designated "Pet. App.". References to the respondents Appendix here are designated "Resp. App.".

The First Circuit was totally consistent with Fourth Amendment case law as it related to qualified immunity. The First Circuit considered all of the circumstances pertaining during the arrest, even including circumstances that were not favorable to the respondent.

Although the court did rule that under the circumstances of this case the jury would have been entitled to exercise its common sense in determining that Jones had used excessive force, it also found that the jury had the benefit of expert testimony that supported its verdict.

The First Circuit did not hang its decision on a single opinion from another circuit in order to find that the law in this matter, for purposes of qualified immunity, was clearly established. The First Circuit's decision in this matter is supported by case law from the Supreme Court of the United States.

Finally, while it is true that the dissenting opinion in this matter requested guidance from this court as to the role of the judge vis-a-vis the jury in fact bound qualified immunity determinations, this very case has cleared up this issue with respect to the First Circuit, the *only circuit* cited by the petitioner as ever having articulated any concern about this issue.

RESPONDENT'S COUNTERSTATEMENT OF THE FACTS DEVELOPED AT TRIAL

On July 14, 2003, members of the Rhode Island State Police were posing as customers (R536) inside a building maintained as a cigarette store on Narragansett Indian tribal land in Charlestown, Rhode Island waiting for uniformed members of the police to arrive to execute a search warrant and seize cigarettes. (R534). When uniformed officers arrived in the parking lot to commence the raid the undercover officers inside the building went into action (R539, 540) and were initially perceived by the tribal workers within the store as robbers. (R199, 200). There was initially some physical exchange between undercover officers and tribal members.

After the initial disruption subsided, Adam Jennings and several other workers were instructed to sit down in chairs behind the counter of the store. They all complied. (R546).

Jennings, however, was yelling at the officers words to the effect that they had no right to be on the tribal land and that they had man-handled his mother when the raid began. (R141, 142, 564, 572, 573).

There came a time when Trooper Bell, who was in charge of the situation within the trailer, finally told Jennings that he had to leave the trailer. Bell did not inform Jennings that his intent was to place Jennings under arrest; he merely told him to "leave". (R561, 562).

In immediate compliance with the instruction of Trooper Bell, Jennings got up from his seat and attempted to leave the building. (R561). Then Bell yelled to other officers "cuff him". (R553). Taken completely by surprise, Jennings exclaimed "I'm not getting arrested" or words to that effect. (R554). The petitioner observed Bell speaking to Jennings while Jennings was still seated behind the counter and saw and heard Bell inform Jennings that he was "kicked out". (R120, 121, Resp. App. 2).[2]

Several officers descended upon Jennings to place him in custody. The officers wrestled Jennings to the floor (R555) and pinned him on his stomach. (R310).

While Jennings was lying face down on the floor his *left* arm was trapped under his torso. His right arm was by his side. (R311, Resp. App. 10).[3] Jennings

---

[2] Curiously, the petitioner also testified that he was still outside the building when he heard Ken Bell say "you are out of here, you are under arrest." (R129). The petitioner was not only self-contradictory about where he was; he contradicted Bell, who admitted he had never advised Jennings that he was being placed under arrest. (R561, 562).

[3] At trial the petitioner made the issue of whether one hand was still concealed an important part of his claim that his actions were objectively reasonable. Defense counsel established through the testimony of Trooper Hill that Hill had extracted Jennings left arm from underneath his torso and through the testimony of the petitioner that both hands were initially concealed by his body near his waistband. (R123). In his brief the petitioner inaccurately cites to the record (R338, 339) for the proposition that Jennings himself admitted that his *right* hand was still under his torso when his ankle was broken. (Pet. App.

(Continued on following page)

became completely passive to the point where Trooper Hill, once he extracted Jennings' only unexposed hand from underneath his torso, stood up from his position at Jennings' left shoulder, and left. (R151, 152). Jones makes the breathtaking claim that the "*uncontradicted* testimony is that Jennings. . . . continued his active resistance until he was flex cuffed, after the injury." (Pet. App. 9). No fewer than three witnesses and a state police video contradicted this claim at trial. Adam Jennings, Domingo Monroe and Daniel Piccoli all testified in one way or another that Jennings was not resisting. (Jennings at R310-314, Resp. App. 9-13), (Monroe at R253, 254, Resp. App. 7-9), (Piccoli at R209-212, Resp. App. 3-7).

Well after Trooper Hill got up from the group of officers on the floor that was administering to Jennings, Trooper Jones broke Adam Jennings ankle

---

6). Reference to the record reveals that Jennings did not say *which* hand was under his body. (R338, 339, Resp. App. 14, 15). The petitioner has mischaracterized the record. However, Jennings also testified that only one arm was initially under his body and it was his left arm. (R311, Resp. App. 10). It was, therefore, curious for the petitioner to claim that the First Circuit opinion failed to acknowledge that Jennings' other hand was under his body at the time of injury, (Pet. App. 5) since the evidence in the case, in a light most favorable to Jennings, was that he was mistaken about whether a hand was still under his torso when his injury occurred since the evidence indicated that the only hand trapped under Jennings torso (Jennings' left hand) was extracted by Hill well before Jennings' injury. The First Circuit failed to acknowledge that Jennings' "other hand was under his body" because it wasn't.

with his bare hands. (R122). He did so by gratuitously increasing his force on Jennings ankle.

The jury returned a verdict against Trooper Jones both on Jennings' excessive force claim and the claim based on assault and battery pursuant to Rhode Island common law. Jones filed a post-trial motion for JMOL which was granted by the district court judge based upon his conferral of qualified immunity. Jones failed to pursue conditional rulings on his motions for a new trial and remittitur. The respondent appealed the district court decision. The First Circuit has remanded the case to the district court on rulings on these two motions, having reversed the district court's conferral of qualified immunity.

REASONS FOR DENYING THE WRIT

I. THE FIRST CIRCUIT DID NOT ABANDON THE ESTABLISHED TESTS AND PRINCIPLES USED TO EVALUATE POLICE CONDUCT IN EXCESSIVE FORCE CASES.

A. THE FIRST CIRCUIT DID NOT DISGARD THE TOTALITY OF THE CIRCUMSTANCES TEST.

The decision of the First Circuit carefully examined the totality of the circumstances in ruling that the trial court erred in granting qualified immunity to the petitioner.

The court recognized in the first page of its decision that Adam Jennings initially resisted the arrest and that the resistance required the use of force by state police to subdue him.

The opinion recognized that Jones' application of a compliance technique, deemed "the ankle turn control technique" by the petitioner, was appropriate to gain control. (Pet. App. 20).

The opinion also contemplated that Trooper Hill had extracted Jennings left hand from where it had been trapped under Jennings' torso. (Pet. App. 5).

The First Circuit viewed a video tape that was in evidence during the trial. The video tape showed Trooper Hill stand up from the group on the floor and walk away after he had extracted Jennings left arm from underneath his torso. The appellate court recognized that "several seconds" passed from the time Hill got up and left until "Jennings yelled in pain and his ankle was broken". (Pet. App. 5, 6).

The court contemplated that Jones' own appellate brief described the period from Hill's departure to Jennings' ankle having been broken as being 12-15 seconds. (Pet. App. 6).

The court considered the testimony of the respondent, who said with respect to the timing of his injury:

> Q: (By Attorney Bradley) And prior – I know it's hard to describe this in terms of time, but did there come a point in time while your

arm was trapped underneath your body where you had completely ceased to move?

A: (Jennings) Yes.

Q: Ok. And after your arm was removed from your body, from underneath your body, did you then resume any kind of physical movement?

A: No, I did not.

(R.312, 313). (Resp. App. 12, 13).

Among the circumstances in the totality of circumstances the court considered was the testimony of Dan Piccoli, who testified that while Jennings was on the floor there was no movement on Jennings' part. (R209-212). (Resp. App. 3-7).

The court considered the testimony of Domingo Monroe who testified that Jennings was pinned by several officers and had no way of moving. (R253, 254). (Resp. App. 7-9).

Applying the factors of *Graham v. Connor*, 490 U.S. 386 (1989) the court clearly considered that Jennings was not being arrested for anything as grievous as assault with a deadly weapon but rather was being arrested for "complaining loudly that the Rhode Island Police had no right to be on his property, and that he expressed concern "over their treatment of his mother". (Pet. App. 4).

The court examined whether Jennings posed a threat to the safety of the officers or others and whether he was actively resisting.

It is unclear from the petitioner's brief what circumstances in the "totality of these circumstances" the First Circuit failed to consider, and what relevance those circumstances would have had.

This court should not grant the writ of certiorari based upon the First Circuit's alleged failure to consider the totality of the circumstances confronting the petitioner.

B. THE FIRST CIRCUIT DID NOT DEPART FROM OTHER CIRCUITS THAT HAVE ESTABLISHED THE MOMENT OF HANDCUFFING AS A BRIGHT LINE FOR DETERMINING WHEN FORCED (WHETHER USED OR INCREASED) IS EXCESSIVE.

The petitioner asserts that the First Circuit departed from a bright line rule that does not exist. The petitioner seems to argue that there are no restrictions on a police officer's use of force until the arrestee is handcuffed. In attempting to create this as an issue, the petitioner continues to insist, as he must, that the respondent was resisting arrest and control right up until the time that the petitioner broke his ankle. The respondent never argued at trial or on appeal that the respondent had a duty to *de-escalate* his force prior to the respondent being

handcuffed but rather that it was excessive force to increase force for no reason on a compliant arrestee. The First Circuit grasped this simple point.

The First Circuit noted that it was error for the district court to have failed to appreciate the distinction between the utilization of a compliance technique and an increase in force. (Pet. App. 41, 42).

There is no bright line rule that sanctions a police officer's increase in his use of force on a controlled and passive arrestee merely because he is not yet handcuffed. The cases cited by the petitioner do not establish this as a rule of law.

The failure of the petitioner to observe the distinction in this case between the utilization of force and a baseless increase in force erroneously mischaracterizes the issue and fails to provide a basis for granting the writ.

C. A JURY'S "COMMON SENSE" CAN BE USED TO DETERMINE THE REASONABLENESS OF AN OFFICER'S CONDUCT.

Not only may a jury's common sense in obvious cases be used to determine the reasonableness of an officer's conduct, *Isom v. Town of Warren*, 360 F.3d 7 (1st Cir. 2004), *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993), *Adewale v. Whalen*, 21 F. Supp. 2d 1006 (D. Minn. 1998) but the jury in this case was *not left* to rely solely on its own common sense but had the

benefit of the expertise of Lieutenant Delaney. Lieutenant Delaney was an employee of the Rhode Island State Police who testified that he was responsible for the training of state police officers in control techniques. (R122).

Delaney testified that an officer is supposed to adjust the amount of force he uses according to what the arrestee is doing. In other words the use of force analysis is a "two way street", meaning that if the level of resistance changes, the level of force should be adjusted upward or downward correspondingly:

> Q: (By Attorney Bradley) So that even if an officer feels at one point in time that that one level of force is appropriate he is supposed to adjust the amount of force he uses in response to a lessening of the arrestee; isn't that true?
>
> A: (Trooper Delaney) Yes. That would be the trooper's own assessment of where that lies, yes, sir.
>
> Q: Well, that would be his assessment, but he is supposed to make that assessment, isn't he?
>
> A: Yes.
>
> Q: And that is what you call, in your vernacular, the de-escalation of force.
>
> A: Correct.

(R448).

While it is true that Delaney defended the use of Jones' ankle turn control technique, he explained its propriety in terms of it being *maintained* and clearly disapproved of an increase in the force used with respect to an arrestee whose level of resistance went down or, in fact, was nonexistent. This distinction was noted by the First Circuit. (Pet. App. 22, 23).

Delaney's expert testimony, when considered in conjunction with the testimony of Jennings, Piccoli, and Monroe, would have established for the jury that there was no justification under accepted police practice for there to be an *increase* in the force used by Jones because Jennings was under control when Jones escalated the force.

Included in the body of information presented to it that the jury could have relied upon to exercise a common sense determination of whether or not Jones' force was excessive was the testimony of *Jones himself*:

> Q: (By Attorney Bradley) Is it your understanding that the use of force can escalate – your use of force can escalate in direct response to an escalation of force on the part of the arrestee?
>
> A: (Jones) Yes, sir, that is correct.
>
> Q: Now, is the use of force continuum, does it only go in one direction? Do you understand what I mean by that?
>
> A: No, sir.

> Q: If you exert more force on an arrestee in response to the arrestee's escalation of his own force, does the use of force continuum also provide that you are to decrease your force if the arrestee decreases his?
>
> A: If the subject is complying, yes, you will *lessen* the amount of force.

(R103).

The petitioner's contention that this issue is worthy of review is erroneous. The petitioner has presented this court with no suggestion that there is a confusion among the circuits or a discrepancy between the United States Supreme Court and the First Circuit decision at issue here that would justify review. The petitioner's reliance upon *Conn v. Gabbert*, 526 U.S. 286 (1999) in misplaced. Conn did not even examine the question of whether a jury could under any circumstances be allowed to rely on its common sense to determine what constituted excessive force. The case examined whether a judge, in examining whether the law was clearly established for qualified immunity purposes, could deem the right at issue in that particular case to be determined by the use of common sense.[4]

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[4] Curiously, the petitioner claims in his brief that "[T]he parties and the trial court agreed that expert opinion was required, and the First Circuit was not free to reject that determination." (Pet. App. 23). The petitioner did not cite to where in the record the parties stipulated to the necessity of expert opinion, probably because they didn't. In any event, the

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D. THERE WAS NO HOLDING IN THIS CASE THAT AN ARRESTEE'S COMPLAINT OF PAIN REQUIRES A LESSENING OF FORCE.

The petitioner here suggests that the "two-member majority instructs officers that they must alter their arrest techniques when an arrestee who is not yet under control says "ow." (Pet. App. 24). Nevertheless, for the petitioner to continue to assert that the record indicated Jennings was "not yet under control" betrays a fundamental failure on the part of the petitioner to accept that the respondent won a verdict, and that because he did, the question of whether the respondent was "under control" has been determined in favor of the Respondent. The proposition contended for by the petitioner here merits little comment. This was not the First Circuit's holding. The principle vindicated by the First Circuit was that the petitioner was not entitled to qualified immunity because an objectively reasonable officer under the circumstances pertaining and known to the respondent should not have *increased* the pressure he was exerting on the respondent's ankle for no reason. The cases cited by the petitioner are irrelevant, the issue fictitious.

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petitioner, without citation to case authority, makes the astounding claim that a legal conclusion of the First Circuit could somehow be preempted by an agreement of the parties.

II. THE FIRST CIRCUIT'S DECISION WAS CONSONANT WITH QUALIFIED IMMUNITY PRECEDENT.

In section II of the petitioner's brief he persists in mischaracterizing the qualified immunity issue in this case as being related to Jones's decision to *use a compliance technique* as opposed to a decision to radically increase the use of force with no justification.

Along the way several mischaracterizations of law and fact are offered.

Wilson v. Layne, 526 U.S. 603 (1999) is erroneously cited for the alleged legal principle that one [court] opinion would not fulfill the burden of "clearly establishing" the law for qualified immunity purposes.

Not only did *Wilson* not hold this; the Supreme Court has ruled that, depending upon the circumstances of the case, there need not be a prior case on all fours with the questioned conduct at all. *Hope v. Pelzer*, 536 U.S. 730 (2002).

Other circuits have rejected qualified immunity claims without a prior case exactly on point. In *Rice v. Burks*, 999 F.2d 1172 (7th Cir. 1993), the Seventh Circuit eschewed the necessity of closely analogous cases where the force used was plainly excessive. *Id.* at 1174. *See, Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2000), holding that qualified immunity may be withheld even in the absence of a

similar fact scenario where the constitutional violation is obvious.

The petitioner distorts the record in this case. Arguing the inapplicability of *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997), a case supporting the First Circuit decision with respect to the "clearly established" prong of the qualified immunity test, the petitioner submits:

> The suspect in *Smith* "docilely submitted to arrest . . . " and later his arm was broken. 127 F. 3d at 1418-20. *No evidence* suggests that Jennings was docile, before or after the command to arrest him was given. (Pet. App. 28). emphasis added.

Obviously there was evidence that Jennings was docile for a substantial period of time after the command to arrest him was given. The evidence of three witnesses has been referenced in this brief and was referenced in the First Circuit's opinion. It was why he won his verdict.

The petitioner can no more prevail by insisting on the nonexistence of evidence that is in the record any more than he can prevail by attempting to convince this court that the excessive force issue in this case is about the constitutionality of the employment of a control technique as opposed to an increase in force.

There is no departure from precedent in this case which would warrant the issuance by this court of writ of certiorari.

III. THERE IS NO BASIS FOR THIS COURT TO ISSUE A WRIT OF CERTIORARI IN ORDER TO EXAMINE THE TRIAL JUDGE'S ROLE IN THE DETERMINATION OF FACTUAL DISPUTES IN THE QUALIFIED IMMUNITY CONTEXT.

The petitioner here didn't file a motion for summary judgment based upon qualified immunity. Instead he elected to proceed to trial. Qualified immunity is an immunity from suit rather than a mere defense to liability; unlike an absolute immunity it is lost if a case is erroneously permitted to go to trial. *Scott v. Harris*, 550 U.S. ___, 127 S.Ct. 1769, 1773 fn2 (2007), citing to *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Presumably, the defendant here would have supported his motion with an affidavit or affidavits that would have more clearly staked out the factual and legal grounds for the claim of qualified immunity. The plaintiff presumably would have responded with counter affidavits. If the trial judge granted or denied the motion, either side could have appealed and at the appellate level the reviewing court would have had to view the facts in the light most favorable to the non-prevailing party in making its determination whether there were genuine issues of material fact making the granting or denial of summary judgment inappropriate.

If the plaintiff prevailed the case would be submitted to the jury. The jury would have rendered a verdict and any party who challenged the verdict on a

JMOL motion would have been confronted with the same daunting burden that the defendant was faced with here: overturning a verdict where every dispute as to a material factual issue had to be viewed in a light most favorable to the prevailing party, a posture no different from the posture of this case when it went up on appeal to the First Circuit.

This issue is not worthy of Supreme Court review. The rules that apply have not been challenged by the petitioner. The petitioner has failed to direct this court's attention to any cases other than from the First Circuit that have alluded to the issue. *Kelley v. La Force*, 288 F.3d 1, 7 (1st Cir. 2002) and *Ringuette v. City of Fall River*, 146 F.3d 1, 6 (1st Cir. 1998) both alluded to the question of the trial judge's role in factual determinations in the context of qualified immunity. It was an issue in neither case although the *Ringuette* court approved of the submission of interrogatories to the jury to resolve factual disputes upon which qualified immunity decisions depend. *Ringuette* at 6.

In this case, the First Circuit, consonant with every other Circuit, examined the record and, consistent with the verdict, resolved all factual disputes apparent from the record in favor of the respondent.

In doing so, its decision did not conflict with other First Circuit opinions, other Circuits opinions, or the opinions of this court.

CONCLUSION

The petitioner's brief has claimed that evidence did not exist which existed, that evidence existed which did not exist, mischaracterized the holdings of other cases, and has mischaracterized the holding of the instant case-all in effort to gain "toe hold" in his quest to be granted a writ of certiorari.

Only by doing so could this petitioner hope to void the inevitable conclusion that this case was a relatively straightforward one where a law enforcement officer's escalation of force was, viewed in the light most favorable to the verdict, unwarranted and inexplicable. This was not a case fraught with subtleties; it was not a case where an officer had to make a split-second decision under trying circumstances, as is made most evident in the video tape that was viewed by the jury.

The petitioner simply ran rough shod over a precept that he himself acknowledged; that it is wrong to increase the force you use upon an arrestee without a reasonably objective reason for doing so. The petitioner's case was won on the facts that were accepted by the jury; his appeal was won because the First Circuit was duty bound to view any disputed facts that arose in the trial in a light most favorable to the verdict. The petitioner has not demonstrated that there is any issue involved in this case as it would relate to qualified immunity that needs resolution by this court. The petitioner's articulated concern

over the role of judge vis-a-vis jury in the determination of qualified immunity issues is interesting, but also not worthy of a writ of certiorari. The only Circuit Court of Appeals to have raised concern over these issues is the First Circuit and the First Circuit has resolved the issue, as it should, by concluding that, not unlike any other fact dispute, factual disputes concerning qualified immunity are properly placed in the hands of the jury, consistent with the Seventh Amendment.

The respondent respectfully urges this court to deny the writ of certiorari.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

PAULLA DOVE JENNINGS, ET AL., Plaintiffs, vs. STATE OF RHODE ISLAND, ET AL., Defendants.	C.A. NO: 03-572T MARCH 21, 2005 10:00 A.M. PROVIDENCE, RI

BEFORE THE HONORABLE ERNEST C. TORRES
CHIEF DISTRICT JUDGE
(JURY TRIAL)

* * *

[March 21, 2005]

[102] THE COURT: Overruled. You may answer.

THE WITNESS [Kenneth Jones]: Can you repeat the question, ma'am.

MS. PARTINGTON: May I have the question read back, your Honor.

THE COURT: Read the question back, please.

(Pending Question Read)

A. I wasn't sure.

Q. At the time did you know how many people were inside the trailer?

A. No, ma'am.

Q. At some point, I believe you've already described it for the jury, you entered the trailer area?

A. Yes, ma'am.

Q. And could you tell the jury as soon as you walked into the trailer what did you observe?

A. I observed several subjects sitting behind the counter, I observed detectives walking around, and I observed Detective Bell speaking to the subject behind the counter.

Q. Do you now know who the subject was that Detective Bell was speaking to at that point?

A. Yes, ma'am.

Q. And who was that?

A. Adam Jennings, ma'am.

[103] Q. And what happened next?

A. I heard Detective Bell tell the – Mr. Jennings to "sit, that's it, you're out of here," and "you're under arrest," and Mr. Jennings stated, "I'm not getting arrested," and that's when a struggle ensued.

Q. Did you hear members of the Rhode Island State Police say something to the effect of "cuff him"?

A. Yes, ma'am.

Q. What did Adam Jennings do when they said "cuff him"?

A. He said, "I'm not getting arrested" and –

* * *

[March 22, 2005]

[17] A [Dan Piccoli]. Outside.

Q. Were you on the ground?

A. Yes.

Q. How tall are you, Mr. Piccoli?

A. 6'4.

Q. And when you observed this situation on the ground, tell me what you saw?

THE COURT: Excuse me, when you say you were on the ground, do you mean you were standing on the ground?

THE WITNESS: Yes, standing outside on the ground.

MR. BRADLEY: I'd like to withdraw my question and do a little bit better job here.

Q. You were standing on the ground, would that mean the parking lot of the Smoke Shop?

A. Yes.

Q. Where were you relative to the stairs that were entering the Smoke Shop?

A. Right next to them.

Q. As you face the Smoke Shop from the parking lot, were you outside the stairs to the right?

A. Yes.

Q. And could you describe what you saw, if anything, going on inside the door of the Smoke Shop?

[18] A. Whew, I'm just nervous. There was a gentleman on the ground and the State Troopers were on top of him, they were just on top of him.

Q. Were you able to see any part of the person who was on the floor?

A. Yes.

Q. And were you able to see police officers next to him?

A. Yes.

Q. And during the time you were watching this, did you see any violent movement on the part of the person on the ground?

MS. PARTINGTON: Objection, your Honor. Form.

THE COURT: The word "violent"?

MS. PARTINGTON: Yes.

THE COURT: I'll sustain the objection.

Q. Mr. Piccoli, could you describe the movements, if any, of the person who was on the floor?

A. There weren't any.

Q. And at the time that you were watching this, were you able to view an officer, an African-American officer who was holding on to Adam Jennings' leg?

A. Yes.

Q. And do you know who that officer was?

A. Well, I didn't know who he is until after; Jones.

[19] Q. How did it come to pass that you discovered afterwards who he was?

A. Through television and people that told me from the paper who he was. Whew . . .

Q. Did there come a point in time –

THE COURT: Would you like a glass of water, Mr. Piccoli?

THE WITNESS: Could I? I'm just nervous.

THE COURT: I wish I had something more to offer you.

THE WITNESS: No, that's all right.

THE COURT: All right, continue, Mr. Bradley.

Q. Did there come a point in time when you heard the person on the floor say something?

A. Yes.

Q. What did you hear him say?

A. He said something in regard to 'Let go, you're going to break my ankle.'

Q. And what, if anything, did the officer who was holding on to his ankle, do?

A. Just twisted more.

Q. Were you able to see an expression on his face as he did it?

A. Yes.

Q. What was it?

[20] A. It was like his teeth, like grinning, you know what I mean? Like, do you know what I'm saying, like grinning his teeth.

THE COURT: Did you say "gritting" or "grinning?"

THE WITNESS: Well, you know, like if you're trying to open something and it won't, you know what I'm saying.

THE COURT: Gritting the teeth?

THE WITNESS: Yeah.

Q. What, if anything, did Adam Jennings say in response? Withdrawn.

What, if anything, did you hear from Adam Jennings in response?

A. I heard him scream.

MR. BRADLEY: I don't have any other questions.

* * *

[61] (Videotape Shown)

MR. BRADLEY: Stop it, please.

Q. Mr. Monroe, what we just viewed, can you tell us in your own words whether you saw that scene on July 14?

A. I did see that scene, but another thing is, its like –

THE COURT: The question is did you see that scene.

THE WITNESS [Domingo Monroe]: Yes, I did see that scene, yes.

Q. Now, how would you describe the, in your own words, what you saw in terms of Adam Jennings being taken down to the floor?

MS. PARTINGTON: Objection, asked and answered.

THE COURT: Sustained.

Q. Did there come a point in time after Adam Jennings was taken to the floor, where he stopped moving?

A. I don't understand the question.

Q. Did there come a point in time after the takedown of Adam Jennings when everything became calm?

A. It stayed calm when he was brought down. I mean there was about a good five or six officers on him where he couldn't move, so I knew – there was no way for him to move.

Q. Did there come a point in time when you heard Adam Jennings say anything as it would relate to his leg?

[62] A. Adam Jennings said, You're hurting my ankle, it was already injured at one point in time, you're hurting my ankle, and then the officer said, Well, if you – if you wouldn't resist, then your ankle – then your ankle wouldn't be hurting, and then as he said that, he cranked down harder on his ankle.

Q. At the point that the officer – withdrawn. Do you know what officer said those words to the effect of, "if you wouldn't resist," etc.?

A. That was Officer Jones.

Q. And at the point that he said, "If you wouldn't resist," or words to that effect, were you able

to see from your vantage point whether Adam Jennings was, in fact, resisting?

A. He was not resisting. Like I said before, he had about a good five or six officers on him over his back, so there was no way of him moving.

MR. BRADLEY: No further questions.

* * *

[118] A [Adam Jennings]. No, I did not.

Q. And did you do anything to any other police officer to physically threaten them?

A. No, I did not.

Q. As you were heading toward the door, what was your intention, what were you going to do?

A. Leave the building.

Q. And what happened next?

A. When I got to the door, and next thing I know somebody was saying, you're under arrest and whatever. I said, What do you mean I'm under arrest, they just told me to leave the building. And then suddenly there was hands all over me.

Q. Okay. And what was your emotional state at the point this was going on?

A. Shock and surprise. I just couldn't believe what was happening.

Q. And did there come a point in time when you were taken down to the floor?

A. Yes.

Q. And when you were taken down to the floor, what was your body position, by that I mean were you – I won't use prone and supine, but was your stomach down or up?

A. I was stomach down.

Q. And when you were stomach down, can you describe [119] the position of your hands?

A. I had one hand down by my side, I had my other hand was trapped up – like my hand was up by my shoulder, trapped underneath me like this.

Q. Which hand was down by your side, which arm was down by your side?

A. My right hand.

Q. And I'll venture that the one that was trapped was your left?

A. Yes.

Q. Did there come a point in time when persons were yelling at you to show your hands?

A. Yes.

Q. And did you?

A. Yes. I told them, I've got – they said something about put your hands behind your back. I said

I've got the one hand I can put behind my back – behind my back. I said the other hand I can't move it, there's too much weight on me, too much weight on my stomach. I could not move it.

Q. While all of this is going on, did there come a point in time when you realized someone was exerting pressure on your foot?

A. Yes.

Q. And at the time that you felt that pressure being [120] exerted on your foot, did you know who the person was that was doing it?

A. I had no idea. No, I didn't.

Q. And while you were on the floor with this arm trapped underneath you, where did you feel the pressure, if any, on your body from officers that were on top of you?

A. On my head, on my neck, on my back, on my leg, on my foot being – that was being twisted.

Q. Did you clearly communicate your physical inability to produce your arm?

A. Yes, I did.

Q. Now, did there come a point in time when your left arm was extracted from underneath your body?

A. Yes.

Q. And prior – I know it's hard to describe this in terms of time, but did there come a point in time while your arm was trapped underneath your body where you had completely ceased to move?

A. Yes.

Q. Okay. And after your arm was removed from your body, from underneath your body, did you then resume any kind of physical movement?

A. No, I did not.

Q. After your arm was removed from underneath your [121] body, did the pressure that was being exerted on your foot, cease?

A. No, it did not.

Q. What, if anything, did you say to this person who was holding on to your foot?

A. You're breaking my ankle.

Q. Did you mention anything about surgery?

A. Yes, I told him, I've had surgery on that ankle before and you keep twisting it you're going to break it.

Q. Now, you've listened and seen the Rhode Island State Police videotape a number of times, haven't you?

A. Yes, I have.

Q. Are you able to testify as to whether or not – withdrawn. Did you feel any – at any point during this – at any point after you said, I just had surgery, you're breaking my ankle, or anything like that, did you feel any change in the amount of pressure that was being exerted on your foot?

A. Yes, I did.

Q. And could you describe that?

A. It was almost, not just incremental, he was turning it, I'm telling the guy, look, you're going to break my ankle and so forth, and he twists it more.

Q. And in the State Police video do you recall hearing [122] yourself scream?

A. Yes, I do.

Q. Is that scream contemporaneous – withdrawn. Did there come a point in time when your ankle was broken?

A. Yes.

Q. Was it broken by the exertion of the person who had his hand on your foot?

A. Yes, it was.

MS. PARTINGTON: Objection, your Honor, calls for an opinion.

THE COURT: Overruled.

Q. It was caused by –

THE COURT: You can cross-examine on that point if you wish, Ms. Partington.

Q. When you felt that increase in pressure, did you feel an immediate increase in your pain?

A. Yes, I did.

Q. And is it when you feel that immediate increase in your pain that we all can hear you scream on the video?

A. I believe so. I think I yelled a couple of times.

Q. Now, what – after you screamed, what happened?

A. Eventually they let me go and told me to stand up, and I told them, you know, I said I can't stand up on this, my ankle's broken. They kind of picked me up, and I hobbled out with them holding me out the door.

* * *

[146] A. That might have been when it broke. I know I felt it, and it was – when I was on the ground it was kind of a blur as to exactly what was going on. I know my one hand was trapped underneath me, the other hand on the side. I know I'm telling the people that, you know, I've broken that ankle before, I'm telling them people, I can't – I got the one hand that I can't move behind my back, I can't move my other hand, there's too much weight on me.

Q. But your ankle was broken while you had at least one hand underneath your body, wasn't it?

A. It seems like it. I don't know.

MS. PARTINGTON: Your Honor, I'd like to publish testimony once again to Mr. Jennings.

Q. Could you look at line 18. Can you see that, is it clear?

A. Yes.

Q. "And I said, you just broke my ankle. Man, why did you do that? I said, you just broke my ankle, and somebody reached down and the arm that was underneath me, they attempted to try to put it behind me or to try to pull it out from underneath me." Did I read that correctly?

A. Yes, you did.

Q. So that means your ankle was broken before your [147] hands were completely out from underneath you, doesn't it?

A. Okay.

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